APPENDIX A

[Filed Aug. 12, 1997]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

B100281
(Super. Ct. No. BC 128884)

REMINGTON INVESTMENTS, INC.,
Plaintiff and Appellant,

v.

XEP NGUYEN, *et al.*,
Defendants and Respondents.

APPEAL from a Judgment of the Superior Court of Los Angeles County. Stephen E. O'Neil, Judge. Affirmed.

SUMMARY

In this appeal we hold that a failed Bank's commercially unreasonable disposition of collateral for a secured loan, contrary to California Uniform Commercial Code § 9504 [1], barred its successor in interest from seeking a deficiency judgment. We reject creditor's argument that the *D'Oench, Duhme* doctrine, protecting the Federal Deposit Insurance Corporation (FDIC) from undocumented

[1] All references to code sections will refer to the California Uniform Commercial Code unless otherwise noted.

side agreements diminishing a failed bank's rights, permitted a deficiency judgment. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Respondents Xep and Quy Huynh Nguyen (Nguyens) operated a donut shop in the Greyhound Bus Terminal. In 1989 Nguyens borrowed $100,000 from Independence Bank (Bank) to buy equipment for the shop. Nguyens signed a promissory note and security agreement giving Bank a security interest in the equipment.

The security agreement provided: "Grantor [the Nguyens] shall keep the Collateral . . . at Grantor's address shown above, or at such other locations as are acceptable to Lender. Except in the ordinary course of its business, Grantor shall not remove the Collateral from its existing locations without the prior written consent of Lender. . . . [¶] . . . Grantor shall not sell, offer to sell, or otherwise transfer or dispose of the Collateral. . . ." The security agreement further specified that termination of the donut shop's business was a default, and that on default, Bank would "have full power to enter upon the property of Grantor to take possession of and remove the Collateral," and "full power to sell, lease, transfer, or otherwise deal with the Collateral or proceeds thereof in its own name or that of Grantor."

The bus terminal closed permanently on October 15, 1991, and was taken over by SAMKO, a property manager. On November 15, 1991, Mr. Nguyen wrote Bank's representative, Mr. Yokomizo, advising that Nguyens were closing the shop and would give up the equipment securing the note. Nguyen asked Bank to pick up the equipment and stated that Nguyens no longer were allowed on the premises. In response Yokomizo told Nguyen that Bank would take possession of the equipment, sell it and apply the proceeds to the loan balance. Mr. Yokomizo

prepared in Mr. Nguyen's presence an unsigned, handwritten note on Bank stationery confirming "written authorization to turn the equipment to Bank, and have us sell it." Nguyen saw Yokomizo write the note and recognized Yokomizo's handwriting. No evidence was offered in the trial court controverting Nguyens' evidence that Yokomizo confirmed Bank's intent to repossess and sell the equipment.

The Nguyens made no more loan payments and did nothing further regarding the equipment. Mr. Nguyen declared "[n]either I nor my wife was ever given notice by the Bank that it had not repossessed and sold the equipment as Mr. Yokomizo promised, or that Mr. Yokomizo had abandoned the equipment to the property management company." The Bank's records contained no other written information relating to disposition of the equipment.

In February 1992 Kathleen Wedgewood, SAMKO's general manager, allowed Mr. Yokomizo into the shop to see the equipment. Yokomizo told Wedgewood of Bank's security interest. Later that day Yokomizo notified Wedgewood that the FDIC had seized Bank, and suggested SAMKO could have the equipment.

In February 1995, when plaintiff and appellant Remington Investments, Inc. (Remington) bought the note from the FDIC, $53,795.38 remained unpaid. Remington sued in June 1995.

The parties filed cross-motions for summary judgment. Remington's motion urged the debt was undisputed. The Nguyens' cross-motion contended a deficiency judgment was barred because Bank had not sold the equipment in a commercially reasonable fashion as required by section 9504. Remington argued in opposition that the *D'Oench Duhme* doctrine, barring enforcement against the FDIC of secret side agreements between a borrower and a bank,

prevented Nguyens from arguing that Bank had agreed to repossess and sell the equipment. The trial court denied Remington's motion, and granted Nguyens'.

Remington appeals.

DISCUSSION

1. Bank's Failure To Reasonably Dispose Of Its Collateral Bars Remington's Right To A Judgment Against Nguyens.

California Uniform Commercial Code section 9504 governs secured lender efforts to recoup debts by selling personal property collateral. Subdivision (1) provides that the secured party after default may sell the collateral and apply the proceeds to defray the expenses of sale and then to reduce the debt.

Subdivision (2)(b), central to the present case, provides:

> "If the security interest secures an indebtedness, *the debtor is liable for any deficiency* [between the proceeds of sale of collateral and the debt] . . . *but only* . . . *if* the debtor was given notice, if and as required by subdivision (3), of the disposition of the collateral in accordance with subdivision (3), *and the disposition of the collateral by the secured party pursuant to this section was conducted in good faith and in a commercially reasonable manner* . . ." (Emphasis added.)

Section 9504, subdivision (2)(b) assures that creditors taking and selling debtors' property will realize reasonable value. Under subdivision (1)(b) the sale proceeds must be applied to reduce the debt, and under subdivision (2)(a) the creditor must account to the debtor for any surplus after sale. These rules operating together limit deficiency judgments to the difference between the debt

and the collateral's real value, and avoid creditor windfalls and debtor forfeitures.

Section 9504, subdivision (2)(b) enforces the requirement for commercially reasonable collateral disposition by denying deficiency judgments to creditors who do not comply.

Cessation of Nguyens' business was a default under section 9504, and under the Security agreement, Bank had the right to take the collateral and sell it to satisfy the debt. As the evidence recited above shows, Bank *exercised* these rights. Bank confirmed to Nguyens in November 1991, orally and in writing, that Bank would repossess the equipment. Consistent with this advice Bank's representative Mr. Yokomizo appeared at the Bus Station in February, and advised the manager of Bank's right to the equipment.

Bank, however, did not act in a commercially reasonable manner in disposing of the equipment. It did not sell the equipment in the fashion required by California Uniform Commercial Code section 9504. Instead, Mr. Yokomizo told Ms. Wedgewood that *SAMKO* could *have* the equipment. This conduct defeated Nguyens' statutory right to have their debt reduced by the proceeds of a commercially reasonable sale of the collateral. The statutory consequence, as noted above, is that Bank and its successor Remington are barred from seeking a deficiency judgment against Nguyens.

2. The "D'Oench Duhme" Doctrine Does Not Defeat Nguyens' Defense to A Deficiency Judgment Under Commercial Code 9504

In *D'Oenche, Duhme & Co. Inc.* v. *FDIC* (1942) 315 U.S. 447, FDIC sued a borrower on a note given to a failed bank. In defense the borrower asserted that the bank had promised not to enforce the note. No evidence

of this alleged promise appeared in the bank's records. The Supreme Court held:

> "Public policy requires that a person who, for the accommodation of the bank, executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced."

This holding was later codified by Congress in 12 United States Code section 1823 subdivision (e), which provides that no agreement which defeats or diminishes FDIC's interest in an asset acquired from an insured bank is enforceable unless, inter alia, it is in a writing signed by the bank and the obligor when the bank acquired the asset.

Remington contends that Bank's "agreement" to repossess the equipment diminished or defeated FDIC's rights and thus was subject to 12 United States Code section 1823, subdivision (e).

We disagree. Mr. Yokomizo's advise to Nguyens that Bank would take and sell the collateral was not an "agreement". Rather, it was an instruction directing Nguyens to comply with the requirements of a *pre-existing agreement*, the security agreement, which gave Bank an unqualified right to repossess, and deprived Nguyens of all right to dispose of the collateral for their own benefit.

Further, Yokomizo's advice to Nguyens of Bank's intent to repossess did not defeat or diminish rights of Bank or its successor. Instead, the notice was one of several steps required under section 9504 to preserve and protect Bank's right both to sell the collateral and obtain a deficiency judgment. The notice benefited Bank rather than impairing its interest.

The interests of Bank and FDIC were defeated, not by Yokomizo's advice to Nguyens of Bank's intent to re-

possess, but rather by his later careless conduct in giving away the collateral to SAMKO.

The trial court correctly concluded that *D'Oenche, Duhme* and 12 U.S.C. 1823, subdivision (e), did not afford a defense against Nguyens' cross-motion for summary judgment.

DISPOSITION

The trial court's summary judgment is affirmed. Respondents shall recover their costs on appeal.

NEAL, J.

We concur:

LILLIE, P.J.

JOHNSON, J.

APPENDIX B

[Filed Oct. 22, 1997]

Second Appellate District, Division Seven, No. B100281
S064439

IN THE SUPREME COURT OF CALIFORNIA

REMINGTON INVESTMENTS INCORPORATED,
Appellant

v.

XEP NGUYEN *et al.*,
Respondents

Appellant's petition for review DENIED.

/s/ George
Chief Judge

APPENDIX C

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 7

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2 Civil B100281
Los Angeles NO. BC128884
Judge: O'NEIL, S.

REMINGTON INVESTMENTS, INC.

vs.

NGUYEN, XEP

REMITTITUR NOTICE

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 08/12/97 is now final.

Affirmed In Full.

Respondents Shall Recover Their Costs On Appeal.

Oct. 31, 1997

JOSEPH A. LANE
Clerk

By: /s/ E. Amin
Deputy Clerk

APPENDIX D

12 USCS § 1823 (1997)

§ 1823. Corporation Monies

* * * *

(e) Agreements against interests of Corporation.

(1) In general. No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 11 [*12 USCS § 1821*], either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution.

* * * *

APPENDIX E

§ 9501. Default; Procedure When Security Agreement Covers Both Real and Personal Property

Text of section operative until Jan. 1, 1999.

(1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this chapter and, except as limited by subdivision (3), those provided in the security agreement. The secured party may reduce his or her claim to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies, and duties provided in Section 9207. The rights and remedies referred to in this subdivision are cumulative.

(2) After default, the debtor has the rights and remedies provided in this chapter, those provided in the security agreement, and those provided in Section 9207.

(3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subdivision referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (subdivision (3) of Section 9504 and Section 9505) and with respect to redemption of collateral (Section 9506), but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if those standards are not manifestly unreasonable:

(a) Subdivision (2) of Section 9502 and subdivision (2) of Section 9504, insofar as they require accounting for surplus proceeds of collateral and deal with the debtor's liability for any deficiency;

(b) Subdivision (3) of Section 9504 and subdivision (1) of Section 9505 that deal with disposition of collateral;

(c) Subdivision (2) of Section 9505 that deals with acceptance of collateral as discharge of obligation;

* * * *

§ 9504. Secured Party's Right to Dispose of Collateral After Default; Notification of Sale; Publication; Effect of Disposition

Text of section operative until Jan. 1, 1999.

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the division on sales (Division 2). The proceeds of disposition shall be applied in the order following to:

(a) The reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) The satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) The satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed and to the satisfaction of any subordinate attachment lien or execution lien pursuant to subdivision (b) of Section 701.040 of the Code of Civil Procedure if notice of the levy of attachment or execution is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reason-

able proof of his or her interest, and unless he or she does so, the secured party need not comply with his or her demand.

(2)(a) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus except as provided in Section 701.040 of the Code of Civil Procedure.

(b) If the security interest secures an indebtedness, the debtor is liable for any deficiency unless otherwise agreed or otherwise provided in the Retail Installment Sales Act, and in particular Section 1812.5 of the Civil Code or any other statute, but only (i) if the debtor was given notice, if and as required by subdivision (3), of the disposition of the collateral in accordance with subdivision (3), and the disposition of the collateral by the secured party pursuant to this section was conducted in good faith and in a commercially reasonable manner or (ii) except for secured transactions entered by a debtor primarily for personal, family, or household purposes, as provided in paragraph (c).

(c) If the secured party has provided notice to the debtor pursuant to subdivision (3), if so required, but has not proceeded in a commercially reasonable manner in the disposition of the collateral, the debtor is liable, subject to paragraphs (b) and (d), for any deficiency only if the balance of the indebtedness immediately before the disposition exceeds the amount that the secured party establishes would have been realized had the disposition of the collateral by the secured party pursuant to this section been conducted in conformity with the conditions set forth in clause (i) of paragraph (b), and the liability is limited to the excess. This paragraph does not apply to secured transactions entered by a debtor primarily for personal, family, or household purposes.

(d) Notwithstanding paragraph (c), if any one or more of the conditions set forth in clause (i) of paragraph

(b) are not proved by the secured party to be satisfied with respect to the disposition, then the debtor is not liable for any deficiency if either:

(i) All of the collateral immediately before the disposition was consumer goods and the amount of the indebtedness immediately before the disposition was one hundred thousand dollars ($100,000) or less.

(ii) The amount of the indebtedness immediately before the disposition was fifty thousand dollars ($50,000) or less.

(e) Upon entry of a final judgment that the debtor is not liable for a deficiency by reason of either paragraph (c) or paragraph (d), the secured party may neither obtain a deficiency judgment nor retain a security interest in any other collateral of the debtor that secured the indebtedness for which the debtor is no longer liable.

(f) To the extent, subsequent to a disposition that does not satisfy any one or more of the conditions set forth in clause (i) of paragraph (b), or subsequent to a collection that does not satisfy the condition set forth in clause (i) of paragraph (c) of subdivision (2) of Section 9502, the secured party disposes pursuant to this section of other collateral securing the same indebtedness, the debtor may, to the extent he or she is no longer liable for a deficiency judgment by reason of paragraph (c) or paragraph (d), or by reason of paragraph (d) or paragraph (e) of subdivision (2) of Section 9502, recover the proceeds realized from the subsequent dispositions, as well as any damages to which the debtor may be entitled if the subsequent disposition is itself noncomplying or otherwise wrongful. Except for secured transactions entered by a debtor primarily for personal, family, or household purposes, neither the subsequent dispositions nor the exercise of any other remedy by the secured party subsequent to a noncomplying disposition or collection shall be deemed tortious or otherwise wrongful based, in whole or in part,

on the fact that it occurred subsequent to a noncomplying disposition or collection.

(g) If the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides. The provisions of subdivision (b) of Section 701.040 of the Code of Civil Procedure relating to the payment of proceeds and the liability of the secured party apply only if the security agreement provides that the debtor is entitled to any surplus.

(h) Nothing herein shall deprive the debtor of any right to recover damages from the secured party under subdivision (1) of Section 9507 or to offset any such damages against any claim by the secured party for a deficiency, or of any right or remedy to which the debtor may be entitled under any other law; provided, however, that, except in the case of any secured party that has willfully failed to conduct the disposition of collateral in good faith and in a commercially reasonable manner or in the case of a debtor who entered the secured transaction primarily for personal, family, or household purposes, any damages recoverable by the debtor shall be reduced by the amount of any deficiency that would have resulted had the disposition of the collateral by the secured party been conducted in conformity with the conditions set forth in clause (i) of paragraph (b) regardless whether or not the debtor is liable for the deficiency under paragraph (b) or (c).